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Nos. 82-5279 and 82-5331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR DIXSON,

Petitioner,

v.

UNITED STATES OF AMERICA

JAMES LEE HINTON,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an employee of a community based, non-profit corporation, under contract with a city to administer a Community Development Block grant received from the U.S. Department of Housing and Urban Development (HUD) is a "public official" according to the Federal bribery statute, 18 U.S.C. 201.

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OPINION BELOW

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JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 201, the Federal bribery statute (18 U.S.C.), provides in pertinent part:

> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty . . . .
>
> (a) For the purpose of this section: "public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such de-

> partment, agency, or branch of Government, or a juror . . . . "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

STATEMENT

On March 12, 1981, the Grand Jury returned a multi-count indictment against petitioners, Arthur Dixson and James Lee Hinton (J.A. 3). It charged that in their capacity as "public officials," according to Section 201, they accepted bribes in return for awarding housing contracts that had been financed by a Community Development Block Grant from HUD to the City of Peoria, Illinois. Dixson and Hinton were, respectively, the executive director and rehabilitation coordinator of United Neighborhood, Inc. (UNI). Tr. 4.

United Neighborhood, Inc.

UNI was a non-profit, community based corporation that had been in existence since 1975. R., Govt. Exhibit 19: A Proposal To Stabilize and Revitalize the United Neighborhoods Community, Jan. 23, 1979, submitted by the UNI Board of Governors to the City of Peoria. Its long-range objective was to create a self-sufficient and desirable community in the center south side of Peoria's "Valley" area, a blighted and impoverished area of the city. *Id.* at 1.

UNI operated out of a renovated structure that had formerly been St. Patrick's Elementary School and sponsored numerous activities aimed at all segments of the community: *e.g.*, providing hot meals for senior citizens, tutoring for grade-school children, craft and sewing classes, and boxing clubs. At the center there also were

the offices of the South Side Improvement Association's Outreach and Referral Program for Senior Citizens, the Mid-State Consumer Energy Council supported by the Illinois Public Action Council, and counseling services offered by staff members of the Human Service Center. *Id.*

The Community Development Block Grant Program

In 1974 Congress enacted the Housing and Community Development Act, 42 U.S.C. 5301-5320 (Supp. III 1979) (The Act). Although the main purpose of this legislation was to consolidate and simplify existing programs, it also contained the authority for developing several new programs, the most important of which was the far-reaching block grant community development program. Senate Report No. 93-693, 1974 U.S. Code Cong. & Ad. News 4273-4500. The bill followed the Nixon Administration's plan for an overhaul and consolidation of existing urban renewal and related programs and incorporated many features of the Administration's special revenue sharing Better Communities Act, S. 1743. *Id.* at 4274.

The Secretary of HUD remained in charge of this program, and there were fairly detailed procedures statutorily provided for the award of grants. 42 U.S.C. 5304. Congress specifically set forth requirements that the Nation's cities must meet to qualify for such grants:

> (1) a summary of a 4-year plan for meeting the community's development needs, including proposed programs to meet housing needs to prevent and eliminate slums and blight, and to improve community services; (2) a description of proposed activities and expenditures; (3) a certification that the applicant has met certain requirements related to the objectives of the act, citizen participation, and the provision of housing; and (4) a performance report assess-

> ing activities carried out under the program in relation to the community's goals and the bill's objectives. [*Id.* at 4274].

Inter alia, the applicant, a State or "a unit of general local government" must also provide satisfactory assurances that, prior to submission of its application, it has provided the residents of the community adequate information concerning the amount of funding available, and has given them a chance to participate in the development of the application and to express their views at public hearings. Section 5304(a)(6).

The Secretary of HUD is required by law to approve an application unless it clearly violates the objectives of this Act. Section 5304(c). Furthermore, unless the Secretary informs the applicant of specific reasons for disapproval of the application within 75 days after receipt, it is deemed approved. Section 5304(f). Once the grant is awarded, the grantee must make annual performance reports, which include any citizen comments submitted pursuant to subsection (a)(6)(D); and the Secretary must review and audit the program to determine whether the grantee has carried out a program substantially as described in the application. Section 5304(d). Also, financial transactions of recipients are subject to an audit by the General Accounting Office. Section 5304(g).

The Federal Grant Received By The City Of Peoria

In accordance with the above discussed statutory scheme (*i.e.*, 42 U.S.C. 5301-5320), in the year 1979 the City of Peoria applied for and received from HUD $400,000 via a Community Development Block Grant, Entitlement No. 79 MC 170018, and $636,000 via a Federal Metro Reallocation Grant from HUD. (J.A. 26). This latter grant was available according to the provisions of

Section 5306(d), which specify that additional funds be awarded to qualifying grantees of a specific category when more funds are available then were applied for.

James Barnes, program manager with the Chicago area office of HUD, was the manager of the Community Development Block Grant Program in the Western part of Illinois at this time and had a staff of five Community Development representatives under him. (J.A. 25). He was not, however, responsible for knowing the name of any sub-grantee, such as UNI. The contract between the city and HUD did not mention that UNI was a sub-contractor, and Barnes testified that he was not even aware that the City of Peoria had hired UNI as its sub-contractor. (J.A. 30).

The Agreement Entered Into Between The City Of Peoria And UNI

Because UNI already was established as a grass-roots, community organization and had the long-standing goal of rehabilitating low-income housing, the City of Peoria accepted UNI's proposal to administer the Community Development Block Grant Program for it (R., Govt. Exhibit 19), and on March 26, 1979 entered into four contracts with UNI. (J.A. 41, 50, 54, and 61, Govt. Exhibits 14, 15, 16, and 17).

The city provided UNI in excess of one million dollars from these HUD funds, so that UNI could provide loan assistance to homeowners in the center southside of the City of Peoria. (J.A. 35). It exercised supervision over this program by requiring that UNI report back to the city and also by making technical assistance available to UNI. (J.A. 32). However, the entire management of these funds was left to UNI, checks were made payable to UNI, and the city neither inspected the books of UNI nor

looked into its disbursement of funds. (J.A. 34). These contracts made no mention that the funds to be administered by UNI had been received from HUD.

The Jobs Petitioners Held In UNI

Dixson was executive director, and Hinton was rehabilitation coordinator of UNI. The job of executive director was described as that of a kind of liaison officer, delegating work to trained volunteers and responsible for communicating directives from the various committees to the staff and for reporting back to the Board of Governors regarding the progress of such programs.[1] The rehabilitation coordinator received applications for housing assistance and bids from contractors, and transmitted this information to the Housing Committee. When the Committee took action he conveyed this information back to the relevant party. He also was required to keep all records regarding UNI's rehabilitation efforts.[2] Thus, one can see from these job descriptions that neither petitioner had the authority to award contracts between UNI and general housing contractors, as the indictment has alleged they did. (J.A. 4).

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[1] "Since UNI is a community run organization, the *Executive Director* will be delegating much organization work to trained volunteers with some of his time allocated to these duties. He will be responsible for all directives from the various committees to the staff, and see that those directives are carried out. He will make regular reports to the committees and the Board of Governors regarding status of programs and activities, make sure that an adequate number of volunteers are trained to carry out assignments in all areas of programming and community development." R., Govt. Exhibit 18, p. 7.

[2] "*Rehabilitation Coordinator* — The duties of this position will be to receive applications and full information on their homes from community individuals who wish to apply for assistance, to obtain full

The Course Of The Proceedings And Disposition Of The Case In The Lower Courts

Petitioners pleaded "not guilty" to all of the counts, and filed motions to dismiss, on the grounds that "the Indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof"—namely, petitioners had not acted as "public officials" according to Section 201(a) in their employment with UNI. (J.A. 9 and 13). At the end of the prosecution's case in chief, petitioners moved for a judgment of acquittal on the same grounds, but it was denied. Tr. 261-262.

The jury found petitioners guilty as charged in all counts of the indictment. On June 10, 1981, petitioners filed motions in arrest of judgment and for a new trial. (J.A. 17, 18, and 20). Each petitioner once again argued that "he was not a public official as charged and at no time during the trial did the government prove that he was a public official," but these motions were denied.

Petitioners were sentenced, and, from the conviction, sentencing, and denial of pre-trial, trial, and post-trial motions, appealed. The Seventh Circuit Court of Appeals affirmed petitioners' convictions. (J.A. 75). On December 13, 1982, this Court granted petitioners' motions for writs of certiorari.

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information on structures to be demolished, to receive bids from contractors, and to present this information to the UNI Housing Committee. After approval, he will make contracts with residents, contractors, and demolition firms for required work. Records and accounts for contracts, follow-ups, and volunteer hours will be kept by this individual, and he will be required to give technical assistance to contractors in areas that his position relates to. He will also work closely with the Director of Materials, Crew, and Demolition, Rehab Supervisors, and the Community Development Department." R., Govt. Exhibit 18, p. 5.

SUMMARY OF ARGUMENT

Petitioners are alleged to be "public officials" according to 18 U.S.C. 201, as "persons acting for or on behalf of the United States . . . in any official function." But clearly petitioners in their employment with UNI performed no such official function for the United States or "any department, agency or branch of Government thereof." They were employees of UNI, a community based, non-profit corporation, and in their employment performed the tasks assigned to them by their superiors. They had no authority as executive director and rehabilitation coordinator, respectively, to award housing contracts on their own. They had no direct contact with the City of Peoria, let alone the Federal Government.

1. Congress defined narrowly the category of "persons acting for or on behalf of the United States . . . in any official function." We find embodied in the words of the United States Grain Standards Act of 1976, 7 U.S.C. 71-87, a description of the narrowly circumscribed class of persons who are deemed by Congress to be "public officials" notwithstanding the fact that they are not Federal employees. Such persons, whether they be self-employed, or employed by a State or local government, or the private sector, are subject to Section 201 as "public officials" when they officially inspect in the name and under the authority of the Federal Government.

Petitioners do not fall within that class. They are three degrees removed from being "public officials." (1) They were not City of Peoria employees involved in administering the Community Block Grant it had received. (2) They were not employees of UNI with direct contact with the City of Peoria, or members of the Housing Committee of UNI with the authority to award housing contracts. (3) Petitioners clearly did not "officially

inspect" in the name of and under the authority of the Federal Government.

2. Even if for the sake of argument we allow ourselves to harbor a lingering doubt that petitioners are subject to Section 201 as "public officials," the dual principles of lenity and federalism make certain that they are not. Congress has traditionally been reluctant to define as a crime conduct denounced as criminal by the States. To preserve sensitive Federal-State relations, it has deferred to the States. Thus, whenever a Federal statute is being construed, there is added to the requirement that ambiguity be resolved in favor of the defendant, the requirement that the statute shall apply to a particular class of persons only if it is certain that Congress intended such an application.

In the United States Grain Standards Act, Congress narrowly defined the category of "public officials" who are "persons acting for or on behalf of the United States . . . in any official function." It expressly made Section 201 applicable to grain inspectors who are not Federal employees. In contrast, in the Community Development Act of 1974, 42 U.S.C. 5301-5320, Congress failed to apply Section 201 to any persons who are responsible for administering such grants. *Expressio unius est exclusio alterius*. Congress has never written or spoken one word that would suggest that it considered persons like petitioners as "public officials" according to Section 201. Such persons do not conduct "official inspections" for the Federal Government but are required to devise local, individualized strategies to remedy urban blight in their particular communities.

3. In the instant case, in which the Seventh Circuit Court of Appeals affirmed the convictions of petitioners, the court presents a confused definition of "public offi-

cial." It finds that petitioners are "public officials" because of the "substantial Federal supervision" of the Community Block Grant to the City of Peoria. But the court said it gave no significance to the testimony of the HUD official responsible for administering this grant that he did not "supervise" UNI or its employees. In fact he did not even know of its existence, nor was he required to do so. In its decision the court said that Barnes' testimony did not make petitioners any the less "public officials" because the court had found "pervasive Federal regulation" of the program. Thus, the court defined "substantial Federal supervision" to mean "substantial Federal regulation"—hardly a clear standard to apply.

The court's further confusion is expressed in designating petitioners "state employees." (J.A. 80). It argued that "their employment by the state does not preclude a determination that they were acting on behalf of the United States." *Id.*

4. It is highly dubious that actions by UNI, a private, non-profit corporation with an existence and goals prior to its receipt of Community Block funds from the City of Peoria, would constitute "state action" under the Fourteenth Amendment. As three recent decisions of the Court have held, complete government funding and extensive regulation of a program administered by a private corporation are not enough to make the acts of the corporation "fairly attributable to the state" and, thus, subject to the requirements of the Fourteenth Amendment.

But even if we assume, *arguendo*, that the actions of UNI would constitute state action, this entails only understanding them as acts of the City of Peoria, and not the Federal Government. Even Procrustes would be hard put to place petitioners in beds reserved for "public offi-

cials." He would have to do some lopping and stretching to get UNI in the bed as performing "state action" for the City of Peoria. But then he would have to stretch this "state action" to encompass action "for or on behalf of the United States." But how could he ever adjust the limbs of petitioners (who did day-to-day tasks assigned to them by their superiors in UNI) so that they fit the bed of "persons officially acting for the Federal Government as its official inspectors"?

THE ARGUMENT

A. THE VERY LANGUAGE OF THE BRIBERY STATUTE AND ITS LEGISLATIVE HISTORY ESTABLISH THAT CONGRESS NEVER INTENDED THAT INDIVIDUALS SUCH AS PETITIONERS BE SUBJECT TO IT

Petitioners were indicted and convicted as "public officials" within the meaning of 18 U.S.C. 201(a). (J.A. 3). The indictment simply alleged in each of the multiple counts that petitioners were "influenced in their performance of an *official act* in respect to the awarding of housing rehabilitation contracts; in violation of Title 18, United States Code, Section 201(c)(1)." *Id.* (Emphasis supplied). Congress, however, did not intend to include persons such as petitioners within the definition of "public official" in Section 201(a). According to Section 201(a):

> "public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

Clearly petitioners did not hold any of the offices enumerated in Section 201(a) and were not "officers or employ-

ees" of the Federal Government. Therefore, if they constitute "public officials" according to Section 201, then they must do so under the category of "persons acting for or on behalf of the United States . . . in any official function." But clearly petitioners do not fall within that category.[3]

(1) The Restrictive Class Of Persons Covered By The Expression "Persons Acting For Or On Behalf Of The United States In Any Official Function"

That Congress never intended Section 201 to apply to petitioners is obvious from the way in which Congress defined the class of persons covered by the expression "persons acting for or on behalf of the United States" in the United States Grain Standards Act of 1976, 7 U.S.C. 71-87. Congress established standards for grain to promote the uniform application by official inspection personnel and to provide for an official inspection system. 7 U.S.C. 74. The more than thirty indictments handed down in the lower Mississippi area and the more than

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[3] The present text of Section 201 was drafted in 1962 and constituted "the substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery." Senate Report No. 2213, 1962 U.S. Code Cong. & Ad. News 3853, 3854. In this Report, the summary discussion of Section 201 is in sharp contrast to the extended one of the conflict of interest section of the bill, which simplified and strengthened the earlier version. Also, in the interest of facilitating the Government's recruitment of persons with specialized knowledge for service on a part-time basis, it limited the impact of those laws on the persons so employed. *Id.*

In the 1962 Act, Section 201 consolidated in one statute the former Sections 201-213. Under the previous bribery statute, Sections 201-213 dealt with various categories of persons who were deemed "public officials." Consequently, the Report's characterization of the term "public official" as "broadly defined" does not mean that persons that

forty defendants who pleaded guilty the year before its enactment illustrate the pervasive corruption in the grain inspection system which this statute was intended to remedy. Senate Report No. 94-747, 1976 U.S. Code Cong. & Ad. News at 6523. By placing all grain inspectors under the direct control of the Department of Agriculture, Congress strove to strengthen the grain inspection system and to restore the integrity and credibility of American grain. *Id.* at 6625.

Even the most cursory reading of the provisions of this Act reveals Congress' intent to give exclusive Federal jurisdiction for establishing, certifying, and enforcing grain standards. In Section 75, in which Congress defined the key terms of the Act, Congress modified many of the terms it was defining by the adjective "official"—*i.e.*, (i) "official inspection," (j) "official inspection personnel," (k) "official mark," (l) "official grade designation," (m) "official agency," (n) "official certificate" and "official form," (o) "official sample," and (x) "official weighing."

Congress created an Administrator in charge of this Federal Grain Inspection Service and under the general direction and supervision of the Secretary of Agriculture. 7 U.S.C. 75a. It authorized the Administrator to issue

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heretofore could not be prosecuted under the bribery statutes could now be prosecuted. As the report states:

> "The term 'public official' is broadly defined to include officers and employees of the three branches of government, jurors, and other persons carrying on activities for or on behalf of the Government." *Id.* at 3856.

Accordingly, we can infer from the Senate's failure to do little more in its Report than paraphrase Section 201(a), that it was not proposing to change the scope of the existing bribery statute in any way by its use of the expression "persons acting for or on behalf of the United States in any official function."

licenses for inspectors and mandated that only persons holding an unsuspended and unrevoked license or authorization from the Administrator perform any official inspection or weighing function. 7 U.S.C. 84(a).

Congress made all grain inspectors, even those who are employees of State or local governments, subject to the sanctions of Section 201. *Section 84(d) of the United States Grain Standards Act provides that all grain inspectors who are not Federal employees are subject to Section 201 as "persons acting for or on behalf of the United States."*[4]

Thus, all persons either licensed or authorized to inspect under this Act, even though they are not employed by the Service, are fittingly characterized as "public officials." They perform an official function for the Federal Government. The standards they apply and the certification they give are official. Such standards have been established and are enforced by the Federal Government.

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[4] "*Inspectors performing under contract not deemed Federal employees.*

Persons employed by an official agency (including persons employed by a State agency under a delegation of authority pursuant to this Act) and persons performing official inspection functions under contract with the Service shall not, unless otherwise employed by the Federal Government, be determined to be employees of the Federal Government of the United States; *Provided*, that such persons shall be considered in the performance of any official inspection, official weighing, or supervision of weighing function as prescribed by this Act or by the rules and regulations of the Administrator, as *persons acting for or on behalf of the United States, for the purpose of determining the application of Section 201 of title 18 of the United States Code to such persons* [emphasis supplied] and as employees of the Department of Agriculture assigned to perform inspection functions for the purposes of sections 1114 and 111 of title 18 of the United States Code." 7 U.S.C. 84 (d).

A person who performs such a function necessarily perceives himself as "a person acting for or on behalf of the United States in an official function." Similarly, all those who deal with him recognize that the value of his inspection is not derived from him personally or even the State or local government by whom he may be employed, but by the authority he possesses as an official inspector for the Federal Government.

The phrase "in any official function" which follows "persons acting for or on behalf of the United States, or any department, agency or branch of Government thereof" in Section 201(a) is not surplusage. It points the way to the meaning of "acting for or on behalf of the United States." It also underscores that no one can correctly be deemed a "public official" unless his actions can be ascribed to "the United States or any department, agency or branch of Government thereof."

Such a person serves as a surrogate, a vicar, a deputy for the Federal Government. When he inspects, even though he holds no Federal office or employment, he does so in the name of, and with the authority of, the Federal Government: "he views and examines officially." Webster's Third International Dictionary. When he grades, he applies Federal standards. Thus, although he does not hold a Federal office and has no employment relationship with the Federal Government, his acts are accurately described as "official" (adj.)—*i.e.*, those of a person "employed in some public capacity; authorised to exercise some specific function." Oxford English Dictionary. His official decisions are both authorized and authoritative.

(2) Because No City Of Peoria Officials Or Employees Who Had Responsibility For The Application Or Administration Of The Community Block Grant Could Be Subject To Section 201 As "Public Officials," *A Fortiori*, Petitioners, Who Were Employees Of UNI, A Non-Profit Corporation That Administered The Home-Owner Rehabilitation Program For A Blighted Area Of Peoria, Would Not Be Acting As "Public Officials" Subject To The Bribery Statute.

Granted, Congress rejected the Nixon administration's proposal that the Housing and Community Development Act of 1974 should award grants to States and local governments with absolutely no strings attached. Nevertheless, the bill that was passed, P.L. 93-383, 42 U.S.C. 5301-5320, in 1974, still was characterized as a "special revenue sharing program," in which the regulations to which grantees are subject are of the most general type: *e.g.*, requirements that the applicant describe in some detail how it intended to use the grant and that the applicant give periodic certification and performance reports about how it was using the money. Senate Report No. 93-693, 1975 U.S. Code Cong. & Ad. News at 4274.

It is the applicant who takes the initiative in making an application for such funds. 42 U.S.C. 5304. It is the "applicant's strategy" for eliminating the urban blight in its area; it is not some standardized Federal program for which the funds are to be used. 24 C.F.R. 507.204 (1981). It is truly a "community" project, in which the applicant is required to obtain community participation at every stage of applying for, and implementing, these community development block grants. *Id.* at Section 507.303; 42 U.S.C. 5301-5320.

Such a program, which envisioned the "establishment and maintenance of viable urban communities" by means of "systematic and sustained action by Federal, State,

and local governments" [42 U.S.C. 5301(b)], contrasts dramatically with the objectives of the United States Grain Standards Act of 1976, P.L. 94-582, which were to strengthen the grain inspection system and to restore the integrity and credibility of American grain. Senate Report No. 94-747, 1976 U.S. Code Cong. & Ad. News at 6625. Congress hoped to restore confidence in the grain inspection system through a system of Federal inspection, which was intended to provide for "greater uniformity and consistency in inspection procedures and operations" and "the placement of inspectors under the direct control of the Department of Agriculture." *Id.* Contrary to the "local strategy" espoused in the Community Development Act, Congress declared that "grain inspection requires a national strategy, a national system, and a national responsibility." *Id.* at 6526. It argued that inspection had to be performed by the Federal Government because it was the United States Government that will certify that lots of grain are of the quality called for in contracts. *Id.*

A study of the contracts between the City of Peoria and UNI reveals the perception of both the city and UNI that this was a local project to accomplish local objectives. The four agreements signed by the parties on March 26, 1979 and the other on October 24, 1979 never even allude to the Federal Government or Federal regulations. (J.A. 41, 50, 54, and 61, Govt. Exhibits 14, 15, 16, and 17). The fact that all contracts for construction or repairs required that those involved comply with the Copeland Anti-Kickback Act, 18 U.S.C. 874, as supplemented by the Department of Labor Relations, 29 C.F.R. Part 3, does not change the essential community nature of the program. (J.A. 71, Govt. Exhibit 25).

City of Peoria personnel who administered the Community Block Grant could not be "persons acting for or on

behalf of the United States . . . in any official function" because they did not serve as Federal inspectors: they did not apply national and uniform standards, and they would not have done so even had they been the UNI employees who awarded housing contracts. The affirmative standards about the contracts regarding amounts, etc., were those devised by the city and UNI. Surely, the requirement that these contracts could not violate Federal laws and the goals of the Act does not change their local character.

(3) Expressio unius est exclusio alterius.

Because this 1974 Housing and Community Development Act does not make State and urban employees subject to Section 201, we can infer that Congress did not intend that it should apply to such employees. In the subsequent United States Grain Standards Act of 1976, 7 U.S.C. 84(d), Congress provided that inspectors who are not Federal employees are subject to Section 201 and are "public officials" because they act "for or on behalf of the United States in an official function of inspecting grain." Consequently, the difference between the role of a State or local employee who serves as a grain inspector and one who administers a community block grant *and* Congress' failure to make the latter subject to Section 201, while making the former so subject, establishes that no officials or employees of the City of Peoria could be subject to Section 201.

Petitioners, therefore, were three degrees removed from being "public officials." They were neither City of Peoria employees nor employees of UNI with authority to award housing contracts on their own. But even if they had been employees of UNI with the authority to award housing contracts *or* employees of the City of Peoria who participated in administering the Community Block

Grant, they still would not have been "persons acting for or on behalf of the United States . . . in any official function."

B. EVEN ASSUMING, *ARGUENDO*, A RESIDUE OF DOUBT ABOUT WHETHER PETITIONERS DURING THEIR EMPLOYMENT WITH UNI ACTED AS "PUBLIC OFFICIALS," THE COGNATE PRINCIPLES OF LENITY AND FEDERALISM REQUIRE THE REVERSAL OF THEIR CONVICTIONS.

In our federal system of government, unless it is a national or constitutional question, the definition of crimes, whether of violence or fraud, is left to the States. Congress has traditionally been reluctant to define as a crime conduct denounced as criminal by the States. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). "The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U.S. Const. Art. 1, 8, cl. 18 [*i.e.*, the necessary and proper clause]." *Rochin* v. *People*, 342 U.S. 165, 168 (1952). Accordingly, when a Federal criminal statute is being construed, there is added to the requirement that ambiguity in the statute be resolved in favor of the defendant, the further requirement that no defendant should be prosecuted under the statute unless it is clear that Congress intended that Federal jurisdiction obtain in such a case. *Bass*, *id.* at 349.

The Principle Of Lenity

In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court ruled that the principle of lenity dictated that it affirm the district court's dismissal of the indictment. The Court ruled that striking employees who had used violence could not be convicted of extortion under the Hobbs Act [18 U.S.C. 1951 (1948)] because the principle of lenity mandated that it give the narrower of two possible con-

structions of the statute. The Court reasoned that, although violence by strikers might entail the "wrongful use of actual . . . force, violence, or fear . . . ," nevertheless the goal of such violence (*i.e.*, obtaining higher wages) was not "wrongful."

The Court in *Enmons*, *id.* at 410, concluded that if Congress had indeed wrought a major expansion of Federal jurisdiction in enacting the Hobbs Act, then it was inexplicable that its action had so long passed unobserved. Similarly, there is no reported case except the instant case in which defendants were found guilty under the bribery statute and in which they had not direct contact in their employment relationship with the Federal Government.

A fortiori, petitioners did not even have any direct dealings with the City of Peoria. Accordingly, the opinion of the Seventh Circuit Court of Appeals is unprecedented and violates the principle of lenity: it has given the Federal courts jurisdiction for the alleged receipt of bribes by petitioners, although they had no direct contact with the Federal Government or even the City of Peoria. It has intruded into an area of criminal law that is traditionally the responsibility of the States (*i.e.*, commercial bribery).[5]

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[5] By analogy, one of the factors to which the Court looks to determine whether Congress intended there to be a private cause of action to enforce a federal statutory scheme is whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law." *Cort* v. *Ash*, 422 U.S. 66, 78 (1975)

Comity And Federalism

According to *United States* v. *Bass*, 404 U.S. at 349, *supra*, if Congress has meant to effect a significant change in the sensitive relation between Federal and State criminal jurisdiction, then, it is essential that it clearly give assurances "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Thus, in *Rewis* v. *United States*, 404 U.S. 808, 812 (1971), the Court declined to accept an expansive interpretation of the Travel Act, because such a construction would have required some corroboration in the legislative history, but none could be found. In *Bass*, the Court concluded that resolving an ambiguity in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 1202(a), must be in favor of the narrower reading. *Id.* at 349. Therefore, the statutory phrase "in commerce or affecting commerce" must apply to "possess," "receive," and "transport," because "absent proof of some interstate commerce nexus . . . section 1202(a) dramatically intrudes upon traditional state criminal jurisdiction." *Id.* at 350.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court held that the 1974 amendments to the Fair Labor Standards Act extending its minimum wage and maximum hour provisions to almost all employees of States and their subdivisions were not within the authority granted Congress by the commerce clause, because they operated directly to displace a State's ability to structure employer-employee relations in an area of traditional government functions and thus impaired a State's ability to function effectively within the federal system. Petitioners are not arguing that it would have been unconstitutional for Congress to have drafted a bribery statute that would have subjected State and city employ-

ees who administered a Community Development Block Grant to it. Rather, petitioners argue only that Congress has traditionally deferred to the States in the area of criminal law, and especially when State and local governmental employees are the ones concerned.

It would be presumptuous of Congress to decide that such State and local governments are not capable of drafting appropriate criminal sanctions against employees who deserve such punishment. It also would be presumptuous of Congress to draft legislation that intrudes into the area of State criminal law. The strictures against making City of Peoria employees subject to the bribery statute apply equally to employees of UNI, since UNI was directly responsible to the city for its management of the housing rehabilitation program.

C. THE SEVENTH CIRCUIT DECISION IN *HINTON* SHOULD BE REVERSED BECAUSE ITS DEFINITION OF WHO CONSTITUTES A "PUBLIC OFFICIAL" IS CONSTITUTIONALLY VAGUE AND POTENTIALLY SUBSUMES UNDER IT ALL EMPLOYEES WHO ARE ALLEGED TO HAVE COMMITTED FRAUD IN THE HANDLING OF FEDERAL FUNDS.

The definition of who constitutes a "public official" under Section 201 given by the Court of Appeals for the Seventh Circuit in this case is ambiguous and, therefore, violates the constitutional requirement that criminal statutes provide adequate notice. *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The court in *Hinton* announced that its decision in *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981), was dispositive and established that petitioners were subject to Section 201 as "public officials," because even though *Mosley* involved a different statutory program (*i.e.*, CETA), both programs involved "substantial Federal supervision."

(J.A. 77); *United States* v. *Hinton*, 683 F.2d 195, 197 (7th Cir. 1982).

1. The court found that "Housing and Community Development Act of 1974 provides for substantial federal supervision over the cities and all sub-grantees responsible for the local distribution of grant funds." (J.A. 78; *id.* at 197-98). The court, however, gave the so-called "Federal supervision" an attenuated meaning: the strongest sense of "supervision" the court gave in the examples it provided of Federal supervision were that the Secretary of HUD "is directed to make reviews and audits of the grantees' programs on at least an annual basis" on the basis of which he may adjust grants for failures to meet federal standards" and "the Secretary reserves the right to audit the financial transactions of fund recipients." (J.A. 78; *id.* at 198). But the definition of "supervision" given in Webster's Third International Dictionary is hardly satisfied by these two examples. Webster defines "supervision" as

> : the act, process, or occupation of supervising : direction, inspection, and critical evaluation : OVERSIGHT, SUPERINTENDENCE (under the *supervision* of an unbiased international commission—*Current Biog.*)

A more accurate expression to describe the court's basis for deciding that petitioners constituted "public officials" is that petitioners acted as "public officials" because of the extensive and substantial *regulation* of the Community Development Block Grant Program administered by UNI: *e.g.*, applicants had to meet certain standards, and the Secretary of HUD issued extensive regulations governing Community Development Block Grants. 24 C.F.R. Part 570 (1981). (J.A. 78; *id.* at 198).

The court revealed that it was using the word "supervision" in a very weak and even Pickwickian sense. It

stated in a final footnote to its discussion that it attached no significance to the testimony of the program manager of the Chicago area office of HUD who had the duty of overseeing the distribution of the Community Block Grant to the City of Peoria during 1979 and 1980, that he did not know, nor was he required to know, the identity of UNI or the fact that the city had hired a sub-grantee to administer the program, because the court said it had found "pervasive federal regulation" of the program. (J.A. 82; *id.* at 200 n. 3). Instead, if the court had tested whether petitioners constituted "public officials" on the "substantial federal supervision over . . . sub-grantees responsible for local distribution of grant funds" [J.A. 78; *id.* at 197-198], as it said it had, then the court should have ruled that petitioners were not public officials because there was absolutely no supervision by the Federal Government of UNI, nor was there required to be any.

The court's characterization of Mr. Barnes' ignorance about the existence of UNI as "personal" ignorance *[id.]* distorts the significance of his testimony. An accurate adjective to describe his ignorance would be "official" ignorance, since he, as the primary Federal official responsible for the administration of the Community Block Grant, neither knew nor was required to know the identity of UNI. (J.A. 27 and 30). Accordingly, the only way the court has avoided retracting its statement that the standard of *Mosley* —namely, that substantial Federal supervision is dispositive of whether petitioners constitute "public officials"—is by equivocating: *i.e.*, by redefining "substantial Federal supervision" to mean "pervasive Federal regulation." The court, thereby, has left U.S. attorneys, defense lawyers and trial judges with a nightmare, since they are expected to make decisions about whether specific individuals can be prosecuted under Section 201 according to an inconsistent standard.

2. The court made a second attempt to articulate a standard for its ruling that petitioners constituted "public officials." It did so in terms of petitioners' positions within the Community Development Block Grant Program. (J.A. 80; *id.* at 198). The court concluded it made no difference whether or not petitioners could award housing contracts on their own without the approval of the Housing Committee, because they would be "public officials," in either case. (J.A. 80; *id.* at 199). Thus, the court once again attenuated its standard for determining that petitioners were "public officials" to mean "having the authority and power *to influence* or control the dispersal of federal funds on behalf of HUD." (J.A. 81-82; *id.*). (Emphasis supplied).

The court was impressed that the salaries of petitioners and the entire cost of the programs they administered "were funded by the federal government for federal objectives." (J.A. 80; *id.* at 198-199). Then the court erroneously assumed that petitioners were employed by the State, arguing that "their employment by the state does not preclude a determination that they were acting on behalf of the United States." (J.A. 80; *id.* at 199).

We, thus, can infer that, according to the court, any person whose salary is derived from Federal funds and who has some influence in the dispersal of Federal funds can be prosecuted as a "public official" under Section 201. The court's expansive construction of Section 201 in effect enables U.S. attorneys to prosecute any person who is alleged to have committed fraud in handling Federal funds when his own income can be viewed as largely derived from the same source: *e.g.*, State, city and local

governmental employees, building contractors, pharmacists, physicians, and nursing home personnel.[6]

D. BECAUSE EXTENSIVE GOVERNMENTAL REGULATION OF AN ENTITY DOES NOT MAKE ITS ACTIONS "STATE ACTIONS" UNDER THE FOURTEENTH AMENDMENT OR ACTIONS "UNDER COLOR OF STATE LAW" ACCORDING TO SECTION 1983 OF THE CIVIL RIGHTS ACT, *A FORTIORI*, PETITIONERS AS EMPLOYEES OF UNI WITH ALLEGED INFLUENCE IN THE DISPERSAL OF FEDERAL FUNDS IN AWARDING HOUSING CONTRACTS SHOULD NOT BE DEEMED "PUBLIC OFFICIALS" UNDER SECTION 201.

The decision of the Seventh Circuit Court of Appeals in the instant case is an aberration. According to the Court's reasoning in *Rendell-Baker* v. *Kohn*, 102 S.Ct. 2764 (1982), *Blum* v. *Yaretsky*, 102 S.Ct. 2777 (1982), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), it is highly dubious that actions of UNI in administering the Community Development Block Grant could be viewed as "state action" according to Section 1983 of the Civil Rights Act: *i.e.*, that UNI's actions are "fairly attributable to the state," which here is the City of Peoria. *See*

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[6] The descriptive definition and test enunciated by the Second Circuit in United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976), regarding who is a "public official" are consonant with Congressional intent. In *Loschiavo*, the court specified that the test for determining whether a particular individual is a "public official" under Section 201 is not the type of public project or the amount of federal funding but the "character and attributes of the individual's employment relationship, if any, with the federal government." *Id.* at 66. The court suggested one practical way of making this determination was whether any Federal agency has the power to hire or fire the individual in question. This latter formula correctly specified the class intended by Congress, except that "the power to hire or fire" has a metaphorical meaning when the Federal official so qualifies because

Lugar v. *Edmondson Oil Co.*, 102 S.Ct. 2744, 2754 (1982). *A fortiori*, the court's decision is unprecedented, since it necessitates the conclusion that UNI's acts "were fairly attributable to the Federal Government" *and* also that petitioners as employees of UNI, capable of exerting influence in awarding housing contracts, were "public officials," "acting for or on behalf of the Federal Government . . . in their official function."

1. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 145, *supra*, the Court ruled that the termination of a customer's electric service without notice, a hearing, or an opportunity to pay amounts found due, by a privately owned and operated utility which held a certificate of public convenience from the State of Pennsylvania, did not have a sufficiently close nexus with the State of Pennsylvania to be "fairly attributable to it, even though the public utility was extensively regulated by the State, enjoyed a virtual monopoly in the area, and concerned an essential service.

2. In *Rendell-Baker* v. *Kohn*, 102 S.Ct. 2764, *supra*, the Court held that the discharge of two teachers of a nonprofit, private school for socially maladjusted students was not actionable under the civil rights act even though: (a) virtually all of the school's funds were derived from the State of Massachusetts in accordance with an

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he is a "person acting for or on behalf of the United States . . . in an official function." Such officials, though not employees of the Federal Government, would have to be licensed or at least authorized by "some department, agency or branch" of the Federal Government, before they would be allowed to do their official inspecting and, correlatively, they would be subject to the deprivation of this Federal licensing or authorisation. *See* also the earlier companion case of United States v. Del Toro, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975).

Act of 1972 to pay for the tuition of such students, (b) a school performs a "public function," and (c) the school was subject to extensive regulation by the State in order to qualify and remain eligible for such funds.

3. In *Blum* v. *Yaretsky*, 102 S.Ct. 2777, *supra*, the Court held that decisions by nursing homes to discharge, or to transfer to nursing homes with lower levels of care, medicaid patients did not constitute "state action" even though: (a) more than 90% of the medical expenses of patients was State subsidized, (b) there was extensive Federal and State regulation of nursing homes, (c) Congress required the periodic review of patient care "to safeguard against unnecessary utilization of such care and services and to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care," and adjustment of benefits results from the decision to discharge or transfer a patient.

Thus, according to the Court's reasoning in these three cases, actions by UNI, a community based, non-profit corporation, would seem not to be "state actions," "fairly attributable to the state." Nearly 100% government funding of the housing rehabilitation program administered by the City of Peoria and extensive regulations of the program by the Federal, State and City government are not enough to make UNI's actions fairly attributable to the City of Peoria and thus subject to the due process requirments of the Fourteenth Amendment.

But, even if we assume, *arguendo*, that UNI's actions constitute "state action," it remains far-fetched to say that petitioners acted as Federal public officials. The finding of state action would only mean that UNI's actions were attributable to the City of Peoria, not the Federal Government. Furthermore, even if we assume, *arguen-*

do, that UNI's actions were fairly attributable to the Federal Government, we would have to go further and say that petitioners' employment relationship with UNI was such that they "acted for or on behalf of the United States . . . in their official function." This we cannot say.

CONCLUSION

For the reasons stated, we respectfully request that the convictions of petitioners be reversed.

Respectfully submitted,

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